Unambiguously ambiguous – a brief comment on the attack on General Soleimani

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von
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In the early hours of January 3 at about 1 a.m. local time, a reaper drone killed Iranian Major General Qassem Soleimani on the road leading to Baghdad International Airport. Killed alongside Soleimani was Abu Mahdi al-Mohandes, deputy commander of Iraq's quasi-official Hashd al-Shaabi, or Popular Mobilization Forces (PMFs) and leader of the Iraqi militia and PMF Keta'ib Hezbollah.The U.S. Defense Department released a statement indicating that

"the U.S. military has taken decisive defensive action to protect U.S. personnel abroad by killing Qasem Soleimani, the head of the Islamic Revolutionary Guard Corps-Quds Force, a U.S.-designated Foreign Terrorist Organization […] This strike was aimed at deterring future Iranian attack plans."

In the morning of January 4, Secretary of State Mike Pompeo asserted that intelligence reports indicated that Soleimani had been *"actively plotting"* to *"take big action … that would have put hundreds of lives at risk,"* and that the United States had acted to eliminate *"imminent threats to American lives."*

Most of the comments draw the conclusion quite quickly that the attacks are clearly contrary to international law. United Nations Special Rapporteur Agnes Callamard described the targeted killings of Soleimani and Abu Mahdi Al-Muhandis in her tweet as

"most lokely [sic!] unlawful and violate international human rights law"

On the basis of the facts known so far, it seems appropriate to make only a preliminary assessment of the legal situation in a rather cautious manner.

The attack could constitute a violation of the prohibition of the use of force under Art 2 (4) UN Charter. However, two justifications are conceivable here, self-defence according to Art 51 UN Charter and intervention by invitation.

Intervention by invitation

Intervention by invitation is a topos under customary international law for the use of force, practised by the Soviet Union in Hungary in 1956 and in Afghanistan in 1979. However, it was abused in these two cases. But also France intervened in the Central African Republic in 1996 on this legal basis. However, an intervention by invitation only creates a legal basis for the use of force if it took place before the intervention and not under pressure from the intervening state.

The statement by the Iraqi Prime Minister Mahdi, that the attack was an obvious violation of Iraqi sovereignty is in fact a clear argument against permission. However, the situation is potentially the same as it was after US drone attacks in Pakistan. The then Pakistani President Musharaf and his successor Zardari condemned various drone attacks. But at the same time they received former President of the USA George W. Bush immediately after drone attacks as a good ally in the fight against terror during a state visit. The drone attacks were massively expanded by President Obama. United States General Eric Holder justified the drone attacks with the permission of the affected state. The reaction of President Mahdi is likely to have been similarly politically motivated and probably took place in opposition to permission. The declaration of the Iraqi parliament on 5 January to expel all foreign troops from the country does not, moreover, speak against permission from Iraq. After all, the former is not binding under international law. On the contrary, it merely shows the enormous domestic political pressure under which the political system in Iraq is currently under.

Anticipatory self-defence

The right to anticipatory self-defence is by no means as controversial under international law as it has been occasionally read in this case. Only the limits of the right to anticipatory self-defence are really controversial. A purely reactive right of self-defence is rather represented by only a few voices. State practice also confirms the relevance of the criteria of the so-called Webster formula,

“a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation”,

for assessing use of force in the run-up to an armed attack. However, the Webster formula in modern international law is perpetuated to “imminence”, even if the term “imminence” is not at all found in the correspondence between the USA and the United Kingdom following the Caroline incident in the 19th century. In this respect, the first question to be asked is whether an attack was imminent. Whether General Soleimani, as commander of the Quds Brigades, had concretely planned an attack, or better again an attack that was imminent and would have reached the quality of an armed attack, is not known to the public at present. Daniel Webster himself also

pointed out in his correspondence, first with Henry Fox and later with Lord Asburton (Alexander Baring), that the scope of the right of self-defence must be assessed according to the situation:

"The extent of this right is a question to be judged of the circumstances of each particular case".

Therefore, it is crucial to know the exact circumstances of the events as far as possible. However, this is currently not the case. Consequently it is not possible yet to assess in any substantive way whether the Caroline criteria were met in the armed attack of 3 January. Moreover, the *"great law of self-defense"* (Webster), as Georg Schwarzenberger rightly stated, is the ultimate right that sovereign states would be prepared to renounce. This, and the lack of information, is probably the reason why none of the states allied with the USA condemned the attack as contrary to international law. The Foreign Secretary of the United Kingdom, Dominic Raab, even affirmed the USA's right of self-defence as early as 5 January:

"It was General Soleimani's job description to engage proxies, militias across not just Iraq but the whole region, not just to destabilize those countries but to attack Western countries… In those circumstances the right of self-defence clearly applies."

However, it is not known whether the British Foreign Office had concrete information about an imminent attack.

To hastily deny the right of self-defence, after a few days and without knowing the exact circumstances, is unlikely to be conducive to the acceptance of international law. Neither does the threat to attack cultural sites, which is in principle contrary to international law.

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